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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

LESLEY ESTHER DIAMOND

VS.

THE STATE OF TEXAS

**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CAUSE NO. 14-17-00005-CR**

**Appealed from the County Criminal Court at Law Number 8
of Harris County, Texas
Cause No. 2112570**

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT GRANTED

IDENTITY OF THE PARTIES

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Appellee:	The State of Texas
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Habeas (Trial) Counsel:	Pam Paaso & Molly Wurzer 500 Jefferson Houston, TX 77002
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Trial & Habeas Judge:	Honorable Jay Karahan 1201 Franklin Houston, TX 77002

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STATEMENT OF THE CASE

The State initially charged appellant with Class B misdemeanor driving while intoxicated (DWI) in cause number 1885998 in the County Criminal Court at Law Number Eight of Harris County on March 24, 2013. After it obtained the results of the analysis of her blood, it amended the information on December 13, 2013, to allege that she committed Class A misdemeanor DWI with a blood-alcohol concentration (BAC) of at least 0.15.

Appellant pled not guilty. A jury convicted her of Class A misdemeanor DWI. The court accepted the verdict and sentenced her to five days in jail and a $2,000 fine on May 1, 2014. However, the clerk erroneously prepared a judgment reflecting that the conviction was for a Class B misdemeanor. On May 21, 2018, the court entered a judgment *nunc pro tunc* correcting the clerical error to reflect that the conviction was for a Class A misdemeanor. Present counsel represented appellant at trial. She did not appeal.

Appellant filed an application for a writ of habeas corpus pursuant to article 11.09 of the Code of Criminal Procedure on September 19, 2016 (C.R. 4-19). The trial court conducted an evidentiary hearing on November 17-18, 2016. It issued written findings of fact and conclusions of law and denied relief on December 5, 2016 (C.R. 31-49; 4 R.R. 5-6). Present counsel represented her. This appeal ensued.

The Fourteenth Court of Appeals issued a published opinion affirming the denial of habeas corpus relief on May 3, 2018. Appellant moved for rehearing. The Court of Appeals granted rehearing and issued published opinions reversing the denial of habeas corpus relief on September 11, 2018. The Stated moved for rehearing. The Court of Appeals denied the State's motion for rehearing, withdrew the opinions of September 11, 2018, and issued published substitute opinions reversing the denial of habeas corpus relief on October 23, 2018. This Court granted the State's petition for discretionary review on February 13, 2019. Diamond v. State, 561 S.W.3d 288 (Tex. App.—Houston [14th Dist.] 2018, pet. granted). Present counsel represented her during the habeas corpus proceeding.

ISSUE PRESENTED

> Whether the court of appeals applied the standard of review correctly in conducting its Brady analysis.

STATEMENT OF FACTS

Harris County Constable Precinct Five deputy constable Justin Bounds stopped appellant for speeding and changing lanes without signaling on the Westpark Tollway about 7:30 p.m. on March 23, 2013 (5 R.R. 144-47; AX 12-1 at 46-49). A supervisor instructed him not to preserve the in-car video that depicted her driving; he lost the handwritten notes that he took the night of the incident; and he admitted that his offense report contained numerous errors (5 R.R. 300-06, 327-30, 335-37; AX 12-2 at 137-43, 164-67, 172-74).

After developing reasonable suspicion to believe that appellant was intoxicated, Bounds called for deputy constable Jennifer Francis to come to the scene to administer standardized field sobriety tests (5 R.R. 158; AX 12-2 at 60). Bounds always calls for another officer to assist him when a traffic stop requires any action beyond writing a citation (5 R.R. 365; AX 12-2 at 202).

The trial court prohibited Francis from testifying because she and Bounds violated Rule of Evidence 614 by discussing the case with the prosecutor in each other's presence after the Rule was invoked and after Bounds began testifying (5 R.R. 185-86; AX 12-2 at 22-23). The State agreed not to offer evidence related to the horizontal gaze nystagmus (HGN) test because Francis administered it (5 R.R. 189; AX 12-2 at 26).

Bounds testified about his observations of Francis' administration of the remaining field sobriety tests. He admitted that the prosecutor made handwritten notes on his offense report of additional clues of intoxication that the prosecutor observed on the scene video but that Bounds did not include in his report (5 R.R. 309-11; AX 12-2 at 146-48). He also admitted that Francis did not properly administer the field sobriety tests (5 R.R. 366; AX 12-2 at 203).

Applicant was arrested for suspicion of driving while intoxicated (5 R.R. 261; AX 12-2 at 98). After she refused to provide breath or blood specimens, police obtained a search warrant to draw her blood (5 R.R. 262-65; AX 12-2 at 99-

102). A registered nurse executed the blood draw (5 R.R. 392-401; AX 12-2 at 229-38).

Bounds was not trained how to transport blood evidence (5 R.R. 377; AX 12-2 at 214). He took custody of appellant's blood at 10:11 p.m. and turned it into the evidence locker at the police department at 12:29 a.m. During the two hours and 18 minutes that he was responsible for her blood, there were at least two extended periods of time totaling between one-to-two hours that he did not have custody of it, that it was unattended, and that its location was not documented (5 R.R. 377-85; AX 12-2 at 214-22).

Andrea Gooden, an analyst with the Houston Police Department (HPD) crime lab, analyzed a sample of what was represented to be appellant's blood on July 8, 2013, using the headspace gas chromatography method, and concluded that the specimen contained 0.193 grams of ethanol per 100 milliliters of blood (5 R.R. 501; AX 12-3 at 50).[1] Gooden admitted that the tubes of blood that she tested were missing the identifying labels that the police officer and/or nurse were supposed to place on them when the blood was drawn (5 R.R. 436-37; AX 12-2 at 273-74).

The jury convicted appellant and found that her BAC was 0.15 or greater (5 R.R. 6; AX 2).

[1] The HPD crime lab became the Houston Forensic Science Center (HFSC) on April 3, 2014 (5 R.R. 32; AX 8 at 5).

SUMMARY OF THE ARGUMENT

The court of appeals correctly applied the well-established standard of review from Brady v. Maryland, 373 U.S. 83 (1963). It correctly concluded that the State violated appellant's right to due process by suppressing favorable impeachment evidence that would have undermined Andrea Gooden's qualifications and the reliability of her opinion. Her testimony was critical because appellant's BAC was the most important evidence at trial. William Arnold, Gooden's supervisor, suspended her from her casework two weeks before the trial because he lacked confidence in her understanding of the basic science and how the instruments worked and because she erroneously released a lab report in an unrelated case with the wrong defendant's name. The State concedes that it failed to disclose to appellant that Gooden was under active suspension when she testified at appellant's trial and the reasons for the suspension.

The court of appeals correctly concluded that the suppressed evidence was favorable. Evidence that undermines an expert witness's qualifications and the reliability of her opinion could result in the exclusion or impeachment of the expert's opinion. Appellant could have used the suppressed evidence of Gooden's suspension and the reasons for it to try to exclude her testimony under Rule of Evidence 702 because the State could not prove that she was qualified or that she

reliably applied the principles and methods of blood-alcohol analysis in appellant's case. Even had the trial court admitted Gooden's testimony, appellant could have impeached her with her active suspension and the reasons for it because that information undermined her qualifications and the reliability of her opinion, which were fair game for expert impeachment.

The court of appeals also correctly concluded that the suppressed evidence was material because it undermines confidence in appellant's conviction for Class A misdemeanor DWI. Had the State disclosed evidence of Gooden's suspension and the reasons for it, there is a reasonable probability that the trial court would have granted appellant's Rule 702 challenge and either disqualified Gooden or excluded her opinion as unreliable. Without any evidence of appellant's BAC, the jury probably would have acquitted appellant. Had the trial court denied appellant's Rule 702 challenge, there is a reasonable probability that an appellate court would have reversed any conviction. Even had the trial court admitted Gooden's testimony, there is a reasonable probability that the jury would not have convicted because it would have had doubted Gooden's qualifications and the reliability of her blood-alcohol analysis and rejected the substance of her testimony that appellant was intoxicated. Had the trial court prohibited appellant from cross-examining Gooden with the suppressed evidence in the jury's presence, there is a reasonable probability that an appellate court would have reversed any conviction.

ISSUE

THE COURT OF APPEALS CORRECTLY APPLIED THE BRADY V. MARYLAND STANDARD OF REVIEW WHEN IT CONCLUDED THAT THE STATE VIOLATED DUE PROCESS OF LAW BY SUPPRESSING FAVORABLE IMPEACHMENT EVIDENCE THAT WOULD HAVE UNDERMINED THE EXPERT QUALIFICATIONS AND RELIABILITY OF THE CRIME LAB ANALYST WHO ANALYZED APPELLANT'S BLOOD-ALCOHOL CONCENTRATION, WHICH WAS THE MOST IMPORTANT EVIDENCE AT TRIAL.

A. The Standard Of Review

Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 (1963); U.S. CONST. amends. V and XIV. The prosecution has a duty to disclose favorable evidence, even if it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Agurs, 427 U.S. 97, 108 (1976).

Impeachment evidence must be disclosed under Brady. Strickler v. Greene, 527 U.S. 262, 281-82 (1999); see also Giglio v. United States, 405 U.S. 150, 153-54 (1972) (Brady applies to evidence undermining witness credibility).

Impeachment evidence is anything offered to dispute, disparage, deny, or contradict. Thomas v. State, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992). "[I]f disclosed and used effectively," impeachment evidence is favorable if "it *may* make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985) (emphasis added).

The State is responsible for suppression of evidence by police and government crime labs because knowledge by one member of the prosecution team is imputed to all members of the prosecution team. See Ex parte Adams, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973) ("arms of the government" are not "severable entities"); Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977) (no distinction between different agencies within same government; prosecution team includes both investigative and prosecutorial personnel); Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984) (knowledge of police imputed to prosecution).

Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. A showing of materiality does not require the defendant to prove that disclosure of the suppressed evidence would have resulted in an acquittal. The question is not

whether appellant more likely than not would have received a different verdict, but whether she received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The court of appeals cited the correct standard of review in its discussion of the issue. Diamond, 561 S.W.3d at 294 (citing Ex parte Miles, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012), regarding application of Brady standard; and Ex parte Navarro, 523 S.W.3d 777, 780 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd), regarding review of lower habeas court's ruling).

B. Pretrial Discovery

The State gave pretrial notice on December 12, 2013, of its intent to present expert testimony from Gooden in forensic chemistry, toxicology, intoxication, blood-alcohol concentration, blood ethyl alcohol testing and analysis, blood ethyl alcohol testing procedure and instruments (including but not limited to headspace gas chromatography), and the effects of alcohol on the body (Supp. C.R. 26-28). The State filed an amended notice of expert witnesses on March 4, 2014, that included William Arnold, then the interim manager of the toxicology section of the lab (Supp. C.R. 29-30).

Applicant filed a Brady motion on April 28, 2014, requesting production of, *inter alia*, any evidence that would impeach a prosecution witness (Supp C.R. 31-33). The trial court granted the motion the same day and ordered the State to

disclose any such evidence (5 R.R. 102-05; AX 12-1 at 4-7). The court specifically noted that the State's obligations extended to "anything that the State has in its . . . constructive knowledge that is responsive to this motion" (5 R.R. 102-03; AX 12-1 at 4-5). The court agreed with appellant's assertion that Brady encompasses any information that the State constructively possesses that would cause evidence to be inadmissible (5 R.R. 104-05; AX 12-1 at 6-7). The State made no Brady disclosures.

C. Gooden provided critical testimony that appellant's blood-alcohol concentration was above the legal limit, and the arguments of the parties focused on the credibility of Gooden's blood-alcohol analysis.

The State called Gooden during its case-in-chief on April 29-30, 2014 (5 R.R. 425-449, 457-65, 474-91, 499-511; AX 12-2 at 262-86; AX 12-3 at 6-14, 23-40, 48-60). It elicited on direct examination that she had a bachelor's of science degree in chemistry; that she had completed between 2,000 and 3,000 lab exercises, ten required readings, two validations on instruments, competency and proficiency tests, courses, and other training; that she had passed all of her competency tests; and that she was trained in using dual column headspace gas chromatography with flame ionization detection.

Gooden testified that she analyzed a sample of what was represented to be appellant's blood using the headspace gas chromatography method and concluded that it contained 0.193 grams of ethanol per 100 milliliters of blood (5 R.R. 501;

AX 12-3 at 50). She acknowledged that there was an irregularity in appellant's case because the evidence was missing a label that should have been prepared by the police or the nurse (5 R.R. 436-37; AX 12-2 at 273-74). However, she asserted that there did not appear to be any tampering with the packaging when she took custody of the evidence.

On cross-examination, appellant attempted to impeach Gooden with her violations of standard operating procedures, her general incompetence, problems with the internal blood control solution that she used to analyze appellant's blood, and her inability to perform Widmark formula calculations (5 R.R. 512-619, 634-35; AX 12-3 at 61-168, 183-84).

William Arnold, Gooden's supervisor, personally observed her testimony (5 R.R. 20-23, 456, 466-73; AX 6; AX 12-3 at 5, 15-22). However, neither he nor any other crime lab employee testified, even though the prosecutor subpoenaed him to testify and told the court during trial that it intended to call him to answer questions that it anticipated Gooden would not be able to answer.

Appellant argued during summation that the jury could not trust an unqualified analyst who works in a lab that does not follow its own standard operating procedures; that it could not convict unless it believed beyond a reasonable doubt that the blood was collected, transported, processed, and analyzed properly; that it could not convict unless it believed Gooden's testimony beyond a

reasonable doubt; and that the biggest risk was that Gooden mixed up appellant's blood sample with someone else's (5 R.R. 764-65; AX 12-4 at 17-18, 24-25).

The prosecutor argued during summation that the only contested issue in the case was whether appellant was intoxicated (5 R.R. 781; AX 12-4 at 34). She admitted, "It is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer" (5 R.R. 782; AX 12-4 at 35). She called him "simple or dumb" (5 R.R. 784; AX 12-4 at 37). She emphasized the blood analysis, arguing that the result confirmed that appellant was intoxicated; that appellant has a high tolerance; that blood and extrapolation evidence was "really important"; and that, if the jury believed the blood evidence, appellant was above the legal limit (5 R.R. 792-94; AX 12-4 at 45-47).

D. The State failed to disclose to appellant that Gooden was under active suspension when she testified at appellant's trial and the reasons for the suspension.

1. William Arnold, Gooden's supervisor, suspended her from her casework two weeks before appellant's trial because he lacked confidence in her understanding of the basic science and how the instruments worked and because she erroneously released a lab report in an unrelated case with the wrong defendant's name.

Gooden analyzed a blood specimen in an unrelated case ("the Hurtado case") on December 9, 2013, which was after she had analyzed appellant's blood but before she testified in appellant's case (2 R.R. 31-32; 5 R.R. 29-30, 59-61, 84-90; AX 8 at 2-3; AX 9 at 10-12; AX 10). The blood specimen in the Hurtado case

had been mislabeled by the arresting officer, who wrote the wrong defendant's name on the vials (2 R.R. 30). HFSC knew about the officer's error but decided to analyze the blood while waiting for him to submit a new form with the correct defendant's name. Pursuant to HFSC policy, Gooden initially set aside the evidence without releasing a lab report until the officer submitted the correct information. However, on January 10, 2014, and before the officer corrected the information, she signed the lab report for the analysis that she had performed on December 9, certifying under oath that it was accurate, even though it contained the wrong defendant's name (2 R.R. 34-36; 5 R.R. 30-31, 62, 84-90; AX 8 at 3-4, 11; AX 9 at 13; AX 10). Arnold reviewed the report and did not notice the error regarding the defendant's name even though he had corresponded with the Harris County District Attorney's Office (HCDAO) about the case (2 R.R. 35-36).

Arnold had concerns about Gooden in March of 2014, so he began additional training (2 R.R. 111-14). He was concerned that she did not understand how the blood-alcohol instruments worked and basic concepts of blood-alcohol analysis because she could not answer basic questions about either.

On April 15, 2014, Gooden found the blood evidence that she had set aside in December of 2013 (2 R.R. 36-37; 5 R.R. 25-26, 32-33, 38-39, 63-64, 84-90; AX 7; AX 8 at 5-6, 11-12; AX 9 at 14-15; AX 10). She discovered that she had erroneously released the lab report in January with the wrong defendant's name.

She immediately notified Arnold, who determined that no one outside HFSC had accessed the report; so he withdrew it from the computer system.

On April 16, 2014, Arnold suspended Gooden from her casework until further notice (2 R.R. 38-39, 58, 115-17; 5 R.R. 33, 64, 84-90; AX 8 at 6; AX 9 at 15; AX 10). He specifically prohibited her from handling any evidence, processing any data, or generating any reports (2 R.R. 46-49, 117; 5 R.R. 33; AX 8 at 6). However, he did not document the suspension or the reasons for it, including her erroneous certification of the lab report with the wrong defendant's name (2 R.R. 54-55, 62, 119-20).[2] He knew that she was supposed to testify in appellant's case at the end of April (2 R.R. 39-41, 119).

Gooden testified for the State against appellant on April 29-30, 2014 (5 R.R. 425-636; AX 7; AX 8 at 6; AX 11). At the prosecutor's request, Arnold observed her testimony (2 R.R. 135-36; 5 R.R. 33; AX 8 at 6). Neither the prosecutor, Gooden, nor Arnold disclosed to the defense that Arnold had reprimanded her for falsely certifying a lab report in the Hurtado case, that he had suspended her from all casework *before* she testified against appellant, and that she remained suspended *when* she testified (2 R.R. 67-72, 119, 123-24, 142). Arnold did not want to jeopardize Gooden's career and subject her to harsh cross-examination (2

[2] Arnold testified that he created a draft of a document—which became formal documentation of her suspension—sometime in April of 2014 (2 R.R. 122).

R.R. 143, 146). There was no procedure or protocol in place for HFSC to notify HCDAO of problems or concerns at the lab (2 R.R. 125-27, 146-47).[3]

On May 12, 2014, Arnold told Gooden that she could not return to casework because she needed to improve her courtroom testimony based on his evaluation of her testimony in appellant's case (2 R.R. 85, 88; 5 R.R. 34; AX 8 at 7). On May 23, Arnold told a human resources director for the City of Houston "that he was sensitive about documenting concerns about [Gooden's] performance which would make [her] subject to painful cross-examination; instead he preferred having her retrain until he was comfortable that she would do well on the stand" (5 R.R. 34; AX 8 at 7). He "planned to handle it informally, so as not to damage her career" (5 R.R. 41; AX 8 at 14). When the human resources director questioned HFSC's president/CEO about the propriety of Arnold's desire to "keep things informal," the president/CEO replied that "things are done 'differently' in a forensic laboratory" than they are in other industries (5 R.R. 75; AX 9 at 26).

On June 4, 2014, Gooden filed a self-disclosure with the Texas Forensic Science Commission (TFSC) concerning the lab report that she issued in the Hurtado case (2 R.R. 73-74; 5 R.R. 35, 59, 84-90; AX 8 at 8; AX 9 at 10; AX 10). She alleged that HFSC had failed to amend the erroneous report; failed to notify

[3] Arnold testified that quality issues at HFSC now go into an information management system that alerts HCDAO, but former HCDAO general counsel Dick Bax asked him to stop sending Bax the alerts because they were too voluminous (2 R.R. 127-35).

HCDAO about the error; and failed to issue a "corrective and preventative report" as required by policy.

Arnold issued a written evaluation to Gooden of her testimony in appellant's case on June 26, 2014 (2 R.R. 75; 5 R.R. 20-23; AX 6). He criticized her for repeatedly testifying falsely that her analysis complied with the lab's standard operating procedures, when in fact she did not use the required instrument and method:

> When asked if your analysis was in compliance with the Standard Operating Procedures regarding the use of instrumentation, you repeatedly stated that it was. This was not the case since the SOP stated one must use a particular instrument and method. The correct answer would have been "no."

Arnold was present when Gooden provided this false testimony, but he failed to correct it or bring it to the attention of the prosecutor or defense counsel (2 R.R. 135-41).

Arnold issued a memorandum to Gooden, and copied other HFSC supervisors, on August 4, 2014 (2 R.R. 77-78; 5 R.R. 25-26; AX 7). He asserted in the memo that he determined in early April of 2014—before she testified against appellant—that she was unable to answer basic questions about headspace gas chromatography analysis that caused him to question her understanding of the concepts associated with it. He reviewed those concepts with her and continued to question her knowledge base. On April 15, 2014, he discovered that she had

erroneously released a lab report under the wrong defendant's name. Based on that discovery and his previous observations, he suspended her from casework. Thereafter, she testified in appellant's case. He reviewed her testimony with her on May 2 and eventually documented his evaluation in writing. After extensive retraining, she was allowed to return to casework on July 28, 2014, on the condition that he would review all of her alcohol casework until further notice.

TFSC opened an investigation into Gooden's self-disclosure on August 1, 2014 (5 R.R. 52-53; AX 9 at 3-4). It issued a report on January 23, 2015 (5 R.R. 47-82; AX 9). It found that Arnold was professionally negligent because he failed to follow the standard of practice that an ordinary forensic professional would have exercised, and his negligence substantially affected the integrity of a forensic analysis (5 R.R. 66; AX 9 at 17). It specifically found that he was negligent in failing to issue timely amended reports to HCDAO once Gooden reported the error to him and in failing to issue a timely corrective and preventative report.

TFSC further found that Arnold's "decision *not to document* the reasons regarding [Gooden's] removal from casework" for more than three months was "more troubling than any other aspect of this investigation" (5 R.R. 76; AX 9 at 27) (emphasis in original). By not documenting these reasons or disclosing them to HCDAO, TFSC concluded that Arnold:

1. **deprived the HCDAO of the opportunity to determine whether it had any obligations under Brady regarding the disclosure of impeachment information;**

2. **may have deprived the defense of impeachment information to which it was entitled**;

3. may have created a long-term adverse impact on Gooden and the crime lab;

4. sent the wrong message to others in the crime lab that it is acceptable not to document issues out of fear of tough cross-examination; and

5. undermined the crime lab's long-term goal of serving both law enforcement and defense counsel.

(5 R.R. 77; AX 9 at 28) (emphasis added).

Additionally, the City of Houston's Office of Inspector General (OIG) investigated the matter and issued a report on December 18, 2014 (5 R.R. 28-45; AX 8). It found that Arnold "attempted to shield [Gooden] from the consequences of her error by removing her from casework and retraining her rather than formal documentation" because "[n]egative personnel reports are discoverable by defense counsel and can do great damage to an analyst's credibility" (5 R.R. 44; AX 8 at 17). Arnold knew that her cross-examination in appellant's case "would be difficult at best if it started with documentation that she reported a blood analysis indicating a legal violation to the wrong individual" (5 R.R. 41; AX 8 at 14). She testified in three trials without any documentation of her error (5 R.R. 43; AX 8 at

16). OIG concluded that the root cause of the issue was a "lack of attention" by both Gooden and Arnold (2 R.R. 106-07; 5 R.R. 40; AX 8 at 13).

As a result of the TFSC investigation, HFSC implemented corrective actions and made policy changes that included, *inter alia*, a review of all cases supervised by Arnold and, in partnership with HCDAO, retraining of all forensic analysts and crime lab supervisors on disclosure obligations under Brady (5 R.R. 78-82; AX 9 at 29-33).

HCDAO general counsel Dick Bax oversaw Brady disclosures for HCDAO (2 R.R. 197). He first learned about the Hurtado case and Gooden's and Arnold's role in it in October of 2014 (2 R.R. 200). He received the TFSC report in January of 2015 (2 R.R. 201). He summarized the report and emailed his summary to all of the HCDAO prosecutors on February 10, 2015 (2 R.R. 201-02). He did not believe that the information in the report constituted Brady material, but he did not know that Arnold had suspended Gooden because she did not understand the basic principles of the science and how the instruments worked (2 R.R. 202, 222). He would not disclose as Brady material the fact that a supervisor suspended an expert because she did not understand the science of blood-alcohol analysis (2 R.R. 226). However, he suggested that it was a "good idea" for prosecutors to disclose the report to defense counsel in cases involving Gooden and Arnold (2 R.R. 211). He did not determine what cases Gooden testified in for the State while she was under

suspension, even though the report referenced three such cases, because it never crossed his mind to do so (2 R.R. 202-03). At the time of appellant's trial, HCDAO had no formal Brady policy or committee to oversee the office's compliance with Brady (2 R.R. 204). At that time, he would confer with individual prosecutors on a case-by-case basis to help them decide whether to make Brady disclosures, but he ultimately deferred to individual prosecutors to decide whether to make disclosures (2 R.R. 205). He admitted that Arnold should have documented Gooden's suspension (2 R.R. 207). He conceded that evidence that an expert had issues concerning her competency and proficiency would be admissible (2 R.R. 221).

2. The court of appeals correctly held that the State failed to disclose impeachment evidence to appellant.

The State stipulated in the habeas corpus proceeding that it failed to disclose that Gooden issued the erroneous lab report in the Hurtado case and that she was "removed from her casework" (2 R.R. 16). The court of appeals acknowledged that the State conceded that it did not disclose this information to appellant. Diamond, 561 S.W.3d at 294. The court of appeals applied the correct standard of review to determine that appellant proved that the State failed to disclose the evidence at issue.

The State had no choice but to make these concessions because Gooden and Arnold admitted that they did not notify HCDAO or appellant that she had been

suspended (2 R.R. 61-62, 67-69, 92, 119, 142-50). Indeed, it did not "cross [Arnold's] mind" to disclose the suspension (2 R.R. 123-24). HFSC had no policy or procedure to notify HCDAO of problems at the lab (2 R.R. 125-27). Arnold first notified HCDAO of the suspension on June 26, 2014, when he talked to prosecutor Samantha Knecht about the erroneous Hurtado lab report (2 R.R. 159-62). He admitted that HFSC did not respond appropriately to HCDAO and that he should have formally documented the suspension in a timely manner (2 R.R. 179, 182-84). As a result of this incident, HFSC has created mechanisms to notify HCDAO immediately of future problems (2 R.R. 185).

Gooden testified in three criminal trials, including appellant's, while she was under suspension, but she did not disclose the suspension to any prosecutor (2 R.R. 72). Rebekah Kratochvil, the trial prosecutor, did not know that Arnold suspended Gooden two weeks before the trial, nor that Gooden was under suspension when she testified (2 R.R. 191). Had she known, she would have issued a formal Brady notice to appellant.

E. The court of appeals correctly held that the suppressed evidence was favorable to appellant because evidence that undermines an expert witness's qualifications and the reliability of her opinion could result in the exclusion or impeachment of the expert's opinion.

The court of appeals held that the suppressed evidence was favorable to appellant because, "had [it] been disclosed and used effectively by appellant's counsel for impeachment, it might have made the difference between appellant's

conviction and a possible verdict of acquittal." Diamond, 561 S.W.3d at 296 (citing Bagley, 473 U.S. at 676). The court of appeals applied the correct standard of review to determine that appellant proved that the suppressed evidence was favorable.

As a preliminary matter, Kratochvil, the trial prosecutor, testified at the habeas evidentiary hearing that the suppressed evidence was favorable to the defense; that she would have disclosed it had she known about it; that Arnold's concerns about Gooden's knowledge base was relevant to Gooden's expert qualifications; and that she would not have objected had appellant tried to impeach Gooden with the suspension and with Arnold's concerns about her qualifications (2 R.R. 191-94). Because Kratochvil would not have objected to appellant's use of the suppressed evidence, the trial court would have had no reason or opportunity to prohibit appellant from cross-examining Gooden with it. The State ignores this argument.

1. Appellant could have used the suppressed evidence of Gooden's suspension and the reasons for it to try to exclude her testimony because the State could not prove that she was qualified or that she reliably applied the principles and methods of blood-alcohol analysis in appellant's case.

Apart from whether the suppressed evidence would have been admissible before the jury, it was favorable to appellant because she could have used it to try to exclude Gooden's expert testimony altogether in a hearing outside the presence

of the jury. Appellant made this argument in the trial court (3 R.R. 16-17).

Had the State disclosed that Gooden was under active suspension, or had been "removed from her casework," at the time of appellant's trial—not only because of the Hurtado case but also because Arnold lacked confidence in her qualifications and her understanding of the basic science—appellant could have used that information to ask the trial court to exclude her testimony under Rule of Evidence 702 and Kelly v. State, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992). The court would have conducted a hearing outside the presence of the jury to determine if Gooden was qualified to give expert testimony and, even if she was, to determine whether she applied the principles and methods of blood-alcohol analysis in a reliable manner in appellant's case. Thus, the suppressed evidence was favorable to appellant because it provided a basis to exclude the testimony.

Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert* by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(emphasis added). "Before admitting expert testimony, the court must be satisfied that . . . the witness qualifies as an expert . . . ." TEX. PRACTICE SERIES, Vol. 2A, Courtroom Handbook on Texas Evidence, Goode, Wellborn and Sharlot, Ch. 5 Rule 702, Author's Comments (1), 532 (West 2010). The proponent of the witness

has the burden to establish her qualifications. Penry v. State, 903 S.W.2d 715, 762 (Tex. Crim. App. 1995). "This should be done before the witness begins to give the expert testimony, and opposing counsel ordinarily should be given the opportunity to conduct a *voir dire* examination to test the qualifications of a tendered expert." Courtroom Handbook on Texas Evidence, Ch. 5 Rule 702, Author's Comments (3), 533.

Even if an expert is qualified, the court must exclude her testimony if the proponent cannot prove that her opinion is reliable on the occasion in question. As with the witness's qualifications, the court determines reliability outside the presence of the jury. Kelly, 824 S.W.2d at 573. The proponent of the evidence in criminal cases must prove reliability by clear and convincing evidence. Id.; Mata v. State, 46 S.W.3d 902, 908 (Tex. Crim. App. 2001). "Because reliability determinations are made under Rule 104(a), *the court may consider inadmissible evidence*." Courtroom Handbook on Texas Evidence, Ch. 5 Rule 702, Author's Comments (11), 541 (emphasis added).

At issue in a Rule 702-Kelly hearing is whether the witness has applied the principles and methods of the scientific technique in a reliable manner. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 577 (Tex. 2006); Courtroom Handbook on Texas Evidence, Ch. 5 Rule 702, Author's Comments (6), 535. The trial court must consider, *inter alia*, the testifying expert's qualifications and the experience

and skill of the person who applied the technique on the occasion in question. Kelly, 824 S.W.2d at 573. Kelly applies to all offers of scientific evidence, whether novel or not. Hartman v. State, 946 S.W.2d 60, 63-64 (Tex. Crim. App. 1997). Even if the scientific theory and technique are well-established, the proponent always must establish that the particular test or theory was applied properly in the particular case. Mata, 46 S.W.3d at 915-17 (retrograde extrapolation of blood-alcohol concentration reliable in theory, but expert opinion inadmissible when done improperly).

In early April of 2014, before appellant's trial, Arnold determined that Gooden could not answer basic questions about headspace gas chromatography blood-alcohol analysis that caused him to question her understanding of the concepts associated with it (2 R.R. 111-14). He reviewed those concepts with her and continued to question her knowledge base. On April 15, two weeks before appellant's trial, he discovered that she had released the erroneous Hurtado lab report. Based on that discovery and his previous observations, he suspended her from casework (2 R.R. 115-17).

Had the State disclosed Gooden's suspension and the reasons for it to appellant before Gooden testified, appellant could have taken Gooden on *voir dire* examination outside the presence of the jury to challenge whether Gooden was qualified to testify as an expert in the science of headspace gas chromatography

blood-alcohol analysis or, alternatively, whether she reliably applied the scientific technique in appellant's case. Appellant could have called Arnold during the Rule 702-Kelly hearing to testify that, at the time of the trial, Gooden was not "qualified as an expert by knowledge, skill, experience, training, or education." The State had the burden to prove her qualifications and the reliability of her opinion by clear and convincing evidence. Had the State disclosed the suppressed evidence, it would have been favorable because appellant could have used it to try to exclude her testimony under Rule 702 and Kelly. Had the court granted appellant's request to disqualify Gooden or to exclude her opinion, the State could not have introduced evidence of appellant's BAC at trial because no other witness properly could have testified to that scientific evidence.[4] See Melendez-Diaz v. Massachussetts, 557 U.S. 305, 309-11 (2009) ("certificates of analysis" containing results of forensic analysis performed on drugs were testimonial; admission without testimony of analysts violated Confrontation Clause); Burch v. State, 401 S.W.3d 634, 637-38 (Tex. Crim. App. 2013) (lab report in drug case was testimonial; introduction through surrogate witness who did not perform scientific analysis violated Confrontation Clause).

[4] Had the trial court found that Gooden was qualified and that her opinion was reliable under Rule 702 and Kelly, and had it admitted her testimony before the jury, the suppressed evidence still was favorable because appellant would have preserved the Rule 702 issue for appellate review. The suppression of evidence prevented him from preserving the issue.

The court of appeals correctly held that, even if the suppressed evidence were inadmissible at trial, it "could have been used in moving under Rule of Evidence 702 to exclude Gooden's expert testimony entirely based on lack of qualifications or reliability." Diamond, 561 S.W.3d at 295.

The State concedes that the suppressed evidence "could have made a difference" in a Rule 702-Kelly hearing "if it could have led the trial judge to (1) exclude Gooden's testimony about appellant's blood-analysis results, or (2) exclude Gooden's testimony entirely." State's Brief at 18. This acknowledgement that appellant could have used the evidence in a Rule 702-Kelly hearing constitutes an admission that the evidence was favorable under Brady. The State does not assert—nor could it in good faith—that the suppressed evidence would have been inadmissible in a Rule 702-Kelly hearing.[5]

Accordingly, the suppressed evidence was favorable to appellant because it could have been used in a Rule 702-Kelly hearing.

[5] In the part of its brief attacking the court of appeals's favorability analysis, the State argues that the suppressed evidence "could not have led to exclusion of appellant's test results or of Gooden's entire testimony." State's Brief at 19. However, that argument relates to materiality, not favorability.

2. Even had the trial court admitted Gooden's expert testimony, appellant could have impeached her with her active suspension and the reasons for it because that information undermined her qualifications and the reliability of her opinion.

Even had the trial court determined that the State met its burden in a Rule 702-Kelly hearing because Gooden was qualified as an expert and her opinion was reliable on this occasion, the suppressed evidence was favorable to appellant because she could have cross-examined Gooden in the jury's presence with the active suspension and the reasons for it. Appellant made this argument in the trial court (3 R.R. 17-19).

The primary, essential purpose of the Confrontation Clause of the Sixth Amendment is to give a party the opportunity to cross-examine opposing witnesses because that is the "principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 315-16 (1974). A court may not prohibit a party from pursuing a line of cross-examination that could give a reasonable jury a significantly different impression of the witness's credibility. Delaware v. Van Asdall, 475 U.S. 673, 680 (1986).

The trial court concluded that evidence that Gooden was suspended would have been irrelevant and inadmissible. It cited Rule of Evidence 608(b) and Johnson v. State, 433 S.W.2d 546 (Tex. Crim. App. 2014). It also concluded that evidence of the erroneous Hurtado report was irrelevant and inadmissible, citing

Rule 608(b) and Molina v. State, 450 S.W.3d 540 (Tex. App.—Houston [14th Dist.] no pet.). These conclusions miss the mark.[6]

First, Rule 608(b) has no bearing on the admissibility of the suppressed evidence of Gooden's suspension and the reasons for it. That rule generally prohibits cross-examination of a witness with a specific instance of conduct "for the purpose of attacking or supporting the witness's credibility" to establish the truthful or untruthful *character* of a witness. "It is important to note that Rule 608 addresses the use of reputation, opinion and specific act evidence *only when it is offered to prove a witness's character*, from which the factfinder is to infer that the witness is acting in conformity with that character and is therefore more likely to be testifying untruthfully or truthfully." Courtroom Handbook on Texas Evidence, Ch. 5 Rule 608, Author's Comments (1), 495 (emphasis added). Rule 608 does *not* address attempts to impeach a witness through other techniques, such as bias and capacity. Dixon v. State, 2 S.W.3d 263, 271 (Tex. Crim. App. 1998) (op. on reh'g); see also Hoffman v. State, 514 S.W.2d 248 (Tex. Crim. App. 1974) (specific acts admissible to rebut witness's misleading assertion of unblemished past); Bell v. State, 620 S.W.2d 116 (Tex. Crim. App. 1980) (specific acts admissible to rebut witness's misleading statements regarding extent of criminal

[6] The trial court failed to make any findings or conclusions regarding the favorability of Arnold's determination that Gooden did not understand the basic science and instruments, and that he was concerned about her qualifications. That evidence was separate from the fact that he suspended her and that she released the erroneous lab report in the Hurtado case. The court of appeals was not obligated to defer to findings or conclusions that the trial court failed to make.

history). Accordingly, Rule 608(b) only prohibits cross-examination with specific instances of conduct that attack the witness's *character* for truthfulness. The rule does not apply when the evidence is offered for other proper purposes.

Rule 608(b) does not apply to this case. Appellant would not have offered the suppressed evidence to attack Gooden's character for truthfulness. That evidence does not demonstrate that she has mendacious character. Rather, it would have been admissible to rebut and undermine her expert qualifications and the reliability of her opinion after the State presented her as a qualified expert. In other words, the suppressed evidence did not demonstrate that she was a liar or had bad character. It was admissible for other proper purposes. Rule 608(b) did not even apply, and the trial court erred in concluding that it would have provided a basis to exclude the impeachment evidence. The court of appeals correctly held that Rule 608(b) would not prohibit admission of the suppressed evidence because it "has no relation to whether Gooden has a propensity for being untruthful." Diamond, 561 S.W.3d at 295.

Second, the suppressed evidence was *not* inadmissible under Johnson v. State, 433 S.W.2d 546 (Tex. Crim. App. 2014). Johnson held that a court can limit a defendant's cross-examination of witnesses with pending criminal charges. The trial court allowed the defendant to elicit that witnesses had pending charges and ask whether they expected a benefit in exchange for their testimony. However, the

court did not allow cross-examination on the nature of the specific charges and the punishment ranges. This Court held that the trial court's reasonable limitation did not violate the Confrontation Clause, especially where it allowed some cross-examination on the topic of the pending charges. There was no reason to believe that the jury would have had a significantly different impression of the witnesses' credibility had the court allowed the additional cross-examination.

By contrast, the State's suppression of evidence that Gooden was under suspension and the reasons for it deprived appellant of the opportunity to cross-examine her *at all* on the fact that her supervisor suspended her because he lacked confidence in her qualifications and the basis of her knowledge of the applicable science. That type of cross-examination probably would have given the jury a significantly different impression of Gooden's credibility—not because it would have demonstrated dishonesty, but because it would have shown that she was unqualified and her opinion was unreliable. Johnson did not even apply, and the trial court erred in concluding that it would have provided a basis to exclude the impeachment evidence.

Third, the suppressed evidence was *not* inadmissible under Molina v. State, 450 S.W.3d 540 (Tex. App.—Houston [14th Dist.] no pet.). Similar to Johnson, Molina held that the trial court permissibly limited the defendant's cross-examination of a witness by excluding testimony about an unrelated, pending

federal criminal investigation of the witness. The defendant failed to show a causal connection or logical relationship between the witness's testimony against him and the potential for bias as a result of a pending investigation. Id. at 551-52. Molina is inapposite to appellant's case, as it bears no relation to a defendant's right to cross-examine an expert witness with evidence that undermines her qualifications or the reliability of her opinion. The trial court erred in concluding that it would have provided a basis to exclude the impeachment evidence.

The State asserts that the suppressed evidence was unfavorable because it was irrelevant and, thus, inadmissible under Rules of Evidence 401 and 402. State's Brief at 13-14. However, the State ignores that the evidence was relevant because it could have provided the jury with a factual basis to reject Gooden's expert qualifications and the reliability of her expert opinion. This quintessential impeachment evidence undermined the credibility of the most important prosecution witness. No evidence was more relevant to whether appellant was intoxicated than Gooden's expert opinion that her BAC was above the legal limit and, in fact, above 0.15. Evidence that undermined her expert qualifications and the reliability of her opinion was, by definition, relevant because it would have made it less probable that the jury would credit her opinion as fact. Thus, the court of appeals correctly held that the suppressed evidence "is relevant because it can be used for impeachment of Gooden's qualifications and the reliability of her

opinion." Diamond, 561 S.W.3d at 295.

The suppressed evidence was favorable because it would have been admissible before the jury even had the court permitted Gooden to testify to her expert opinion regarding appellant's BAC. Confrontation and cross-examination of adverse witnesses is a constitutional right afforded to criminal defendants, the denial of which often is reversible error. Washington v. Texas, 388 U.S. 14, 19 (1967) (right to present defense by confronting witnesses to challenge testimony is fundamental to due process); Carroll v. State, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996) ("The Constitutional right of confrontation is violated when appropriate cross-examination is limited."); see also TEX. R. EVID. 611(b). This Court tolerates reasonable limitations on cross-examination based on concerns of harassment, prejudice, confusion of the issues, and the witness's safety. Virts v. State, 739 S.W.2d 25, 28 (Tex. Crim. App. 1987). However, those limitations are finite and must not violate fundamental fairness. As the Supreme Court has observed:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Pointer v. Texas, 380 U.S. 400, 405 (1965).

The suppressed evidence was admissible because it directly related to Gooden's qualifications and the reliability of her opinion. Even had the court permitted Gooden to testify, the jury still would have been entitled to know about her suspension and the reasons for it to determine whether to credit her testimony and, if so, what weight to give it. See Holmes v. State, 323 S.W.3d 163, 173 (Tex. Crim. App. 2010) (op. on reh'g) (denial of cross-examination of State's expert on accuracy and reliability of breath test results in DWI cases violated "fundamental rights to fair trial"). The evidence was admissible not only pursuant to the Confrontation Clause but also Rules of Evidence 402 and 702. The trial court would have erred had it prohibited cross-examination of Gooden with the suppressed evidence. It erred in the habeas proceeding in concluding that the suppressed evidence would have been inadmissible under Rule 608(b), Johnson, and Molina. Holmes dictates that the suppressed evidence would have been admissible had the State disclosed it. The court of appeals correctly held that it was favorable because it was admissible for impeachment. Diamond, 561 S.W.3d at 296.

Accordingly, the suppressed evidence of Gooden's suspension and the reasons for it was favorable to appellant because it could have been used to try to disqualify her and exclude her opinion in a Rule 702-Kelly hearing. Alternatively,

even had the court permitted her testimony, the suppressed evidence would have been admissible to impeach her qualifications and the reliability of her opinion.

F. The court of appeals correctly concluded that the suppressed evidence was material.

The court of appeals correctly stated that suppressed evidence is material only if, in light of all the evidence, there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed to the defense, and that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Diamond, 561 S.W.3d at 297. It correctly reviewed the materiality of the suppressed evidence *de novo*. Id. (citing Ex parte Weinstein, 421 S.W.3d 656, 664 n.17 (Tex. Crim. App. 2014)). It held that the suppressed evidence was material because the jury's affirmative finding that appellant's BAC was 0.15 or greater—which resulted in a Class A conviction—was based only on Gooden's testimony. Diamond, 561 S.W.3d at 298. No other witness or evidence supported that finding. The court of appeals elaborated:

> Given the lack of other evidence indicating appellant had a BAC of 0.15 or more, we conclude that there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded. We also conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is a reasonable probability that the jury would have reached a different result.

Id. It applied the correct standard of review to determine that appellant proved that the suppressed evidence was material.

1. **The trial court applied an erroneous standard of review to determine materiality because it concluded that the evidence was legally sufficient and required appellant to prove that she would have been acquitted but for the State's suppression of evidence instead of determining whether the suppressed evidence reasonably could have resulted in any different outcome, including a mistrial resulting from a hung jury.**

Because the court of appeals correctly analyzed materiality *de novo*, it was not obligated to defer to the trial court's materiality analysis. The trial court concluded that, even if the suppressed evidence were favorable and admissible, it was immaterial because Deputy Bounds's testimony regarding appellant's intoxication "was more than sufficient to support" the conviction and because appellant did not prove that Gooden erred in her analysis of appellant's blood (C.R. 46). It concluded that there is no reasonable probability that the jury would have reached a different result even if it had admitted the suppressed evidence (C.R. 47). Importantly, it concluded that the materiality standard of a "different result" does *not* include a mistrial arising from a hung jury (C.R. 34).

Favorable evidence is material, and constitutional error results from its suppression by the prosecution, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. A showing of materiality does not

require the defendant to prove that disclosure of the suppressed evidence would have resulted in an acquittal. Kyles, 514 U.S. at 434. The question is not whether appellant more likely than not would have received a different verdict, but whether she received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Id.

A verdict only weakly supported by the evidence is more likely affected by Brady error than a verdict strongly supported by the evidence. Thomas, 841 S.W.2d at 404. However, the determination of materiality is not the same as a sufficiency-of-the-evidence test. Kyles, 514 at 435; see also Ex parte Temple, 2016 WL 6903758 (Tex. Crim. App. 2016) (Yeary, J., concurring) (not designated for publication). Sometimes, what may appear to be relatively inconsequential evidence may have greater significance in light of other evidence. Hampton v. State, 86 S.W.3d 603, 613 (Tex. Crim. App. 2002). Thus, the court must examine why a particular piece of evidence is material in light of the entire body of evidence. See, e.g., Ex parte Richardson, 70 S.W.3d 865, 871-73 (Tex. Crim. App. 2002) (where State suppressed impeachment evidence that seriously undermined credibility of State's key witness, defendant demonstrated materiality and probability that jury would not have convicted him had six police officers testified to her reputation for untruthfulness).

Three undisputable precepts emerge from the Supreme Court's post-Brady

discussion of materiality:

1. the defendant need *not* prove that, but for the suppressed evidence, she would have been acquitted, Kyles, 514 U.S. at 434;
2. she need *not* prove that, but for the suppressed evidence, the remaining evidence was legally sufficient to sustain the conviction, id. at 435; and
3. she only must demonstrate a reasonable probability of a "different result," but not a "different verdict"; so the issue is whether she received a fair trial resulting in a verdict worthy of confidence, Bagley, 473 U.S. at 682; Kyles, 514 U.S. at 434.

A criminal trial has only three possible results: (1) conviction, (2) acquittal, or (3) mistrial. Mistrials most commonly result from hung juries, although they also may result from irreparable errors that cannot be cured through less drastic alternative measures. A criminal jury hangs even if only *one* juror holds out from returning a verdict. All Brady claim arise post-*conviction*, not after acquittals or mistrials. Therefore, Bagley's definition of materiality—a "different result"—must mean any result *other than* a conviction. In the universe of other possible results, there are two—acquittal and mistrial. But the Supreme Court also instructed in Kyles that, to establish materiality, the defendant need not prove that she would have been acquitted nor that there would have been a different verdict. Thus, "different

result" means something more than just an acquittal. There can be no dispute that a mistrial is a result "different" from conviction. The trial court erred in concluding that the materiality standard of a "different result" does *not* include a mistrial arising from a hung jury (C.R. 34).

The trial court also applied the wrong standard of review to determine materiality because it erroneously applied a sufficiency-of-the-evidence standard. It concluded that the suppressed evidence was immaterial because Bounds' testimony regarding appellant's intoxication "was more than sufficient to support" the conviction (C.R. 46). Yet, a Brady materiality analysis is not the same as a sufficiency-of-the-evidence test. Kyles, 514 at 435. The trial court erred in concluding that the suppressed evidence was immaterial because the remaining evidence was legally sufficient to sustain appellant's conviction. The court of appeals correctly rejected the trial court's erroneous application of a legal sufficiency standard of review. Diamond, 561 S.W.3d at 298 n.6.

2. There is a reasonable probability that the jury would not have convicted appellant had it known about the suppressed evidence because Gooden provided the most important evidence to the State's case and, without credible blood-alcohol evidence, the remaining evidence probably would not have resulted in a conviction.

Applying the appropriate materiality standard to appellant's case, the question is whether she received a fair trial resulting in a verdict worthy of confidence. The State presented substantive testimony from only two witnesses,

Deputy Bounds and Gooden.[7] Appellant destroyed Bounds on cross-examination, and the prosecutor disparaged his abilities during summation. By the State's own admission, the blood-alcohol evidence was the most important evidence of intoxication. Thus, Gooden's testimony was crucial to the State's case. Had it disclosed the favorable evidence regarding her suspension and the reasons for it, and had the court properly permitted appellant to cross-examine her with it, there is a reasonable probability that the jury would not have convicted appellant of Class A misdemeanor DWI based on a BAC of 0.15 or greater.

The trial court concluded that the suppressed evidence was immaterial because Bounds's testimony regarding appellant's intoxication "was more than sufficient to support" the conviction. The court gave too much credit to an officer who always calls for assistance when a traffic stop requires any action beyond writing a citation (5 R.R. 365; AX 12-2 at 202). Moreover, the verdict demonstrates that the jury convicted appellant because it believed Gooden's BAC testimony, as it made an affirmative finding that appellant's BAC was above 0.15. In other words, the jury did not reject Gooden's testimony and the blood evidence but convict appellant of Class A misdemeanor DWI based instead on Bounds's testimony that she was intoxicated.

[7] The State also presented brief testimony from the nurse who drew appellant's blood, Suzanne Curran, but it was not substantial to the State's case, as she did not testify on the issue of intoxication (5 R.R. 392-425; AX 12-2 at 229-62).

Bounds had to provide *all* of the testimony regarding the police investigation because the trial court prohibited the State from calling deputy Francis, who administered the field sobriety tests. Because Francis administered the HGN, the court excluded that evidence. Bounds only could testify about his observations of appellant's driving and other facts related to the traffic stop and her appearance and behavior. However, a supervisor instructed him not to preserve the in-car video that depicted her driving; he lost the handwritten notes that he took the night of the incident; and his offense report contained numerous errors (5 R.R. 300-06, 327-30, 335-37; AX 12-2 at 137-43, 164-67, 172-74). He testified about his observations of appellant's performance on the field sobriety tests that Francis administered—the walk-and-turn and the one-leg-stand. However, he admitted that Francis did not properly administer the tests (5 R.R. 366; AX 12-2 at 203), and he embellished his testimony about the clues that he allegedly observed on those tests after the prosecutor prepared him to testify (5 R.R. 309-11; AX 12-2 at 146-48). He was not trained on how to transport blood evidence (5 R.R. 377; AX 12-2 at 214). He took custody of appellant's blood and, during the two hours and 18 minutes that he was responsible for it, there were at least two extended periods of time totaling between one-to-two hours that he did not have custody of it, that it was unattended, and that its location was not documented (5 R.R. 377-85; AX 12-2 at 214-22).

The prosecutor argued during summation that the only contested issue in the

case was whether appellant was intoxicated (5 R.R. 781; AX 12-4 at 34). She admitted, "It is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer" (5 R.R. 782; AX 12-4 at 35). She called him "simple or dumb" (5 R.R. 784; AX 12-4 at 37). She emphasized the blood analysis, arguing that the result confirmed that appellant was intoxicated; that appellant has a high tolerance; that blood and extrapolation evidence was "really important"; and that, if the jury believed the blood evidence, appellant was above the legal limit (5 R.R. 792-94; AX 12-4 at 45-47).

The trial court's findings and conclusions ignored all of the ways in which Bounds's testimony was undermined on cross-examination and marginalized by the prosecutor during summation.

Gooden testified that appellant's BAC was above the legal limit (5 R.R. 501; AX 12-3 at 50). She acknowledged that there was an irregularity because the evidence was missing a label that should have been prepared by the police or the nurse (5 R.R. 436-37; AX 12-2 at 273-74).

On cross-examination, appellant attempted to impeach Gooden with her violations of standard operating procedures, her general incompetence, problems with the internal blood control solution that she used to analyze appellant's blood, and her inability to perform Widmark formula calculations (5 R.R. 512-619, 634-35; AX 12-3 at 61-168, 183-84). Regarding her qualifications, appellant

demonstrated that she had been a poor science and math student in college (5 R.R. 522-31; AX 12-3 at 71-80). Regarding her experience, appellant's was only the *second* blood-alcohol test that she had performed, as she had been performing tests unsupervised for only two or three weeks (5 R.R. 519-20; AX 12-3 at 68-69).

The State suppressed evidence that Gooden was under active suspension when she testified against appellant because Arnold determined that she could not answer basic questions about headspace gas chromatography analysis that caused him to question her understanding of the concepts associated with it and because she erroneously released the lab report with the wrong defendant's name on it in the Hurtado case.

Had the State disclosed evidence of Gooden's suspension and the reasons for it, appellant could have tried to exclude her testimony altogether. Even had the court permitted her testimony, appellant could have impeached her with the suppressed evidence. Had Gooden disputed the suspension or the reasons for it, appellant could have called Arnold to testify before the jury, as he was under subpoena and present in the courtroom when Gooden testified. No evidence would be more devastating to a prosecution expert than having her own supervisor testify that he suspended her because he lacked confidence in her qualifications and the reliability of her opinion.

But for the State's suppression of this favorable evidence, there is a

reasonable probability of several different outcomes that undermine confidence in the verdict and support the court of appeals's materiality analysis. Had the State disclosed evidence of Gooden's suspension and the reasons for it, there is a reasonable probability that the trial court would have disqualified Gooden or excluded her opinion as unreliable. Without any evidence of appellant's BAC, the jury probably would have acquitted appellant. Had the trial court denied appellant's Rule 702-Kelly challenge, there is a reasonable probability that an appellate court would have reversed any conviction. Even had the trial court admitted Gooden's testimony, there is a reasonable probability that the jury would not have convicted because it would have had doubted Gooden's qualifications and the reliability of her blood-alcohol analysis and rejected the substance of her testimony that appellant was intoxicated. Had the trial court prohibited appellant from cross-examining Gooden with the suppressed evidence in the jury's presence, there is a reasonable probability that an appellate court would have reversed any conviction.

The blood evidence and Gooden's testimony were essential to the State's case. The suppression of the impeachment evidence deprived appellant of a fair trial resulting in a verdict worthy of confidence. Accordingly, the court of appeals correctly concluded that the suppressed evidence was material. See Ex parte Richardson, 70 S.W.3d at 871-73.

CONCLUSION

This Court should affirm the court of appeals's judgment reversing the denial of habeas corpus relief, setting aside appellant's conviction, and remanding for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this brief on Patricia McLean, assistant district attorney for Harris County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service on June 3, 2019.

/S/ Josh Schaffer
Josh Schaffer

CERTIFICATE OF COMPLIANCE

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/S/ *Josh Schaffer*
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